A

BILLION ORIGIN SDN BHD

v.

NEWBRIDGE NETWORKS SDN BHD & ANOR; YAP BURGESS RAWSON INTERNATIONAL SDN BHD (THIRD PARTY)

B

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[CIVIL SUIT NO: S1-22-151-1999]
C 12 JANUARY 2006

LANDLORD AND TENANT: *Negligence - Tenant's office premises flooded with water seeping from premises above - Whether tenant of above premises negligent - Whether landlord in breach of tenancy agreement*

D

CONTRACT: *Tenancy agreement - Breach - Tenant's office premises flooded with water seeping from premises above - Tenant's entitlement to quiet and peaceful enjoyment as per cl. 7.12 of agreement - Whether landlord in breach of agreement - Whether exemption clause applicable*

E ***TORT:*** *Negligence - Tenant's office premises flooded with water seeping from premises above - Whether tenant of above premises negligent - Whether damage forseeable - Whether defence of novus actus interveniens applicable*

F ***TORT:*** *Negligence - Landlord's liability - Tenant's office premises flooded with water seeping from premises above - Whether landlord vicariously liable for act of employee in failing to take remedial steps*

This was the insurer's action, by way of subrogation, against the
G defendants for negligence. The insurers had paid out to the plaintiff company a sum of RM245,701.26 for the loss suffered by the plaintiff as a result of the defendants' negligence. The facts showed that the plaintiff's staff found its premises flooded with water after they had returned to work from a six-day break of
H festive celebrations. The fan placed to cool a computer server on the tenant's premises above had purportedly burnt out causing a fire that triggered the water sprinkler system thereby flooding the plaintiff's premises below. The 1st defendant was the tenant of the premises above whilst the 2nd defendant was the landlord of
I the building of the premises concerned. The 3rd party was the building manager engaged by the 2nd defendant to run and operate the said building. The 2nd defendant sought indemnity

against the 3rd party for the act of its building technician for failing to take remedial action. A

Held (allowing the plaintiff's application):

(1) The exemption clause in cl. 7.3 of the tenancy agreement between the plaintiff and the 2nd defendant only applied if there was no breach of the said agreement by the 2nd defendant. However, the 2nd defendant had breached cl. 7.12 of the same by failing to provide a quiet and peaceful enjoyment to the plaintiff. Further, cl. 7.3 referred only to damage arising from the leakage of pipes, wiring and sprinkler system. In the present case, there was no evidence to indicate such leakage from such conduits. The discharge of water from the sprinkler was a deliberate and intentional act to put out the fire. The facts did not fit the condition expressed in the exemption clause. As such, the 2nd defendant was not entitled to benefit from it. Since the 2nd defendant failed to discharge its contractual obligation, s. 74(3) of the Contracts Act 1950 applied and the 2nd defendant was liable to the plaintiff for breach of contract. (paras 21, 22 & 23) B C D E

(2) There was no doubt that it was the 1st defendant who started the chain of events leading to the damage caused. The 1st defendant had placed a fan to cool the server instead of paying for the building's air-condition supply. Since the fan was running continuously for almost six days it could have short circuited or just burnt out causing the fire. That was evidenced from the burnt fan, carpet, darkened walls and ceiling in the server room. Also, evidenced from the wet floor and floods caused by the water discharged from the sprinkler in the server room to put out the fire that had happened. However, although it was the 1st defendant who was the original wrongdoer who triggered off the incident, it was the subsequent events that eventually caused the damage to the plaintiff. Nevertheless, *prima facie* evidence of negligence was found and it was more probable than not that it was due to an act or omission of the 1st defendant. (paras 28 & 29) F G H

(3) There was no break in the chain of causation nor was the act of the 1st defendant so remote that the original wrong of the 1st defendant was merely history. Neither were the 2nd defendant's and 3rd party's acts wholly independent of the 1st I

A defendant's. The 1st defendant could have foreseen the intervening conducts of the 2nd defendant or 3rd party. Leaving the fan on unattended for almost 6 days would certainly run the risk of it catching fire culminating in what had taken place. As such, the defence of *novus actus interveniens* did B not apply in the circumstances. (paras 30 & 31)

(4) The security guard failed to detect the large amount of water that was virtually flowing down each floor. If he had conducted his rounds on each floor diligently and at regular C intervals, he would have detected the presence of water. Therefore, the 2nd defendant as the employer of the security guard was vicariously liable to the plaintiff. (para 36)

(5) The building technician must bear a certain degree of blame for the damage that had happened. He should have foreseen D that his acts or omissions could cause damage to the plaintiff's goods and properties. The 3rd party as his employer was vicariously liable for his acts and omissions. As such, the 2nd defendant was entitled to indemnity as against the 3rd party. (para 39)

E

[1st defendant to pay plaintiff RM259,592.26 with interest at 8% per annum; 2nd defendant to contribute 50% of RM259,592.26 to 1st defendant; 3rd party to indemnify 2nd defendant 25% of RM259,592.26; and 3rd party to pay costs to the 2nd defendant on the 3rd party notice.]

F

Case(s) referred to:

Barnett v. Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428 ***(refd)***

Bourhill v. Young [1943] AC 92 ***(refd)***

Donoghue v. Stevenson [1932] AC 562 ***(refd)***

G *Noor Azahar Habin v. Rajaswari Sithampara Pillai & Anor [1991] 1 CLJ 150; [1991] 3 CLJ (Rep) 339 HC* ***(refd)***

The Wagon Mound (No 1) [1961] AC 388 ***(refd)***

Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***

H **Legislation referred to:**

Civil Law Act 1956, s. 10(2)

Contracts Act 1950, s. 74(3)

Other source(s) referred to:

Clerk & Lindsell on Torts, 17th edn, paras 2-24

I

For the plaintiff - Sreether Sundaram (S Chrishanthini with him); M/s Murali B Pillai & Assocs
For the 1st defendant - Lam Ko Luen (Visalrani Rajendram with him); M/s Shook Lin & Bok
For the 2nd defendant - Vanaja Dewi Nambiar; M/s Isharidah, Ho, Chong & Menon
For the 3rd party - Tunku Farik Tunku Ismail (Ng Lee Meng with him); M/s Azim, Tunku Farik & Wong

Reported by Usha Thiagarajah

JUDGMENT

James Foong J:

Facts

[1] In 1998, many Malaysians had the good fortune to enjoy a continuous six-day holiday commencing from 28 January to 2 February. The 28 and 29 January was Chinese New Year; 30 and 31 January was Hari Raya; the 1 February was City Day but, being a Sunday, 2 February was substituted as a public holiday for those in the Federal Territories, such as Kuala Lumpur. After such a long break many, the staff of the plaintiff, were eager to return to work at the plaintiff's premises at suite 4.01 on the 4 floor, Menara Keck Seng (the building), Jalan Bukit Bintang, Kuala Lumpur (plaintiff's premises). But they were in for a shock and disbelief. The plaintiff's premises was flooded with water that seeped from the floor above. It happened in this manner:

[2] The occupant of the floor above was the 1st defendant who is, or was, involved in telecommunication business. A computer server was installed in a room at its premises on the 5th floor. As this server was required to be on 24 hours a day, cooling was necessary to prevent overheating. Normally, the cool air generated from the central air conditioning system in the building would be sufficient to keep the server running without overheating. And during weekends, when the central air-condition supply was turned off in the building, the server could still function by a cooling fan placed nearby. But when this practice went on for a continuous period of six days the consequences were grave. Not that the 1st defendant was not aware of this potential danger. What discouraged them from seeking cool air from the central air-

condition system was cost. The landlord charged RM50 per hour for air-condition supply to the entire 1st defendant's premises. Restricted supply to the server room was not possible because of the central air-condition ducting system.

[3] At about 2am on 2 February, a security guard by the name of Suaranjan was on duty when he heard the alarm at the building's control centre. Suspecting that there may be a fire, he immediately investigated the floor identified on the control panel that triggered the alarm. Finding no sign of smoke or fire, he contacted the building technician called Muru. Muru, was not physically in the building. He was on standby at home. After listening to Suaranjan, he advised Suaranjan to carry out further investigation and, if no sign of fire or smoke is detected he should turn off the buzzer at the control panel. This, Suaranjan did. But he did not realize that there was indeed a fire in the 1st defendant's premises located in the server room. The heat caused by the fire must have activated the sprinkler in that room to discharge water therefrom to dose off the fire. But if the sprinkler system, controlled by butterfly valve, was not turned off, water would continue to be released from the sprinkler. This was in fact the case when water landed on ground floor. By then it was morning when employees returning to work discovered the mess. It was not until 8am on the same morning that the butterfly valve controlling the sprinkler in the server room was reversed by the building management staff.

[4] It is revealed in evidence that the control panel had three pertinent indicators and switches associated with fire: the sprinkler, the smoke detector, and the flow switch. The last will tell whether water is discharged from the sprinkler. What is therefore important in this case is whether Suaranjan, after being satisfied that there was no smoke or fire, turned off the flow switch besides the other two. Unfortunately both Suaranjan and Muru could not be traced to testify before this court. At best, we have a report from the building manager, PW6. This report was made soon after the incident from interviews with Suaranjan and Muru. As this is a contemporaneous document, I find the contents therein reflect a fairly accurate account of what took place on that fateful morning. But this report does not disclose material facts to answer the question posed. However, by common sense deduction I came to this conclusion.

[5] First, the sprinkler alarm at the control panel must have been turned off after Suaranjan's investigation otherwise the buzzer would continue to sound. The smoke indicator alarm could not have been activated since there was no corresponding gadget installed inside the 1st defendant's premises to pick up the smoke sense. Such dictator was only installed in the common area. The indicator in this area could not have detected the smoke since water released from the sprinkler would have put off the fire in the server room to eliminate any smoke from escaping to the common area to trigger off this indicator. This also explains why Suaranjan was unable to sniff out smoke at the common area on the 5th floor of the building when he was there to investigate. But as for the flow switch, it must have been on when the alarm sounded because water had escaped from the sprinkler to put out the fire in the server room. If it was on then Suaranjan must have turned it off otherwise the buzzer would continue to appear at the control panel to irritate him.

[6] Like all disasters, shortcomings only surface after the event. In this case it is revealed that only the building manager or his technicians were authorized and had the know-how to turn off the butterfly valve to stop any sprinkler from discharging water. Security guards of the building, like Suaranjan, could not perform this task. It was because of this, that the butterfly valve was only reversed at 8am on 3 February almost 6 hours after the fire alarm sounded. Of course the result was devastating. In the 1st defendant's own premises, "it looked as if it had rained the previous night and we had no ceiling; the whole office was literary drenched" exclaimed the financial controller of the 1st defendant. In the plaintiff's premises where water had seeped from above it was ankle deep, damaging and destroying some of the plaintiff's properties.

[7] For the loss suffered by the plaintiff, the plaintiff claimed from its insurers: Aetna Insurance Company (Aetna). Aetna, after investigation by its adjuster, paid out to the plaintiff a sum of RM245,701.26. The expenses charged by the adjuster for this exercise was RM13,891. To recuperate, Aetna brought this action, by way of subrogation, against the 1st defendant for negligence and against the 2nd defendant, as landlord for the plaintiff's premises, for breach of tenancy agreement as well as negligence. Feeling that the building manager, whom the 2nd defendant had engaged to manage the building, was responsible

for the damage, the 2nd defendant seeks indemnity from the 3rd party. Both the defendants and the 3rd party blamed each other for the damage caused to the plaintiff.

[8] Since this case involves multi parties with claim and cross claims it is necessary to reiterate their relationship with one another. First, the plaintiff being a tenant of the building has a contractual relationship with the 2nd defendant, the owner and landlord of the building. The 1st defendant, also a tenant of the building whose premises is right above the plaintiff's premises, has a tenancy agreement with the 2nd defendant. Blaming the 1st defendant for starting the incident, the plaintiff is suing the 1st defendant for negligence. The 3rd party is or was at all material time a professional building manager engaged by the 2nd defendant to run and operate the building. Since Muru was a staff member of the 3rd party, the 2nd defendant is seeking indemnity from the 3rd party. As for Suaranjan, though he took instruction from the 3rd party employee, he was paid by the 2nd defendant.

Plaintiff's Claim Against The 1st Defendant And Defences Of The 1st Defendant

[9] The plaintiff's claim against the 1st defendant is for the negligence in causing the loss of RM245,701.26 to property and a sum of RM13,891 spent on adjuster's fees.

[10] The defences advanced by the 1st defendant are: (a) the 1st defendant owed no duty of care to the plaintiff and that the damages suffered by the plaintiff were not reasonably foreseeable; (b) the conduct of the 2nd defendant and/or the 3rd party constituted a *novus actus interveniens* which absolves the 1st defendant from liability; (c) the damage caused to the plaintiff was too remote; and (d) the plaintiff has failed to adduce evidence to prove quantum.

[11] In para. 6 of its statement of defence, the 1st defendant seeks indemnity from the 2nd defendant who is blamed for the accident.

Plaintiff's Claim Against The 2nd Defendant And Defences Of The 2nd Defendant

[12] As indicated, the plaintiff's claim against the 2nd defendant is based on two causes of action: breach of contract and negligence. For breach of contract, the plaintiff relies on cl. 7.1 of the tenancy agreement where it is stipulated that the plaintiff is

entitled to quiet and peaceful enjoyment of its premises "without any interruption or disturbances from the landlord or any other person or persons lawfully claiming by or from or under or in trust for the landlord".

[13] The 2nd defendant has denied that it has committed any breach of tenancy agreement, and even if there was a breach the 2nd defendant is exempted from liability by virtue of an exemption clause in the tenancy agreement. Further, the 2nd defendant maintains that damages suffered by the plaintiff must be proved.

[14] As regards to the claim of negligence, the 2nd defendant blames the 1st defendant.

2nd Defendant's Claim For Indemnity Against The 3rd Party

[15] The 2nd defendant's claim for indemnity from the 3rd party is based on terms and conditions of appointment of the 3rd party as manager of the building. One of the terms demands that the 3rd party to: report on the defects of the building, guard the building, ensure safety of the occupants of the building, and to indemnify the 2nd defendant of any claims caused to anyone as the result of the 3rd party's failure and negligence in carrying out of its duties. As a result of the incident, the 2nd defendant claims that the 3rd party has to indemnity the 2nd defendant for the claims made by the other parties.

[16] One of the defences raised by the 3rd party is the existence of an arbitration clause in the agreement which requires dispute between the 2nd defendant and 3rd party to be resolved by arbitration. But since the 3rd party has submitted to the jurisdiction of this court by taking steps in this proceeding to defend itself, I find that this assertion no longer has legal effect. It must be considered abandon by the 3rd party. The other defence of the 3rd party is that the cause of the incident was due to the negligence of the 1st defendant.

Approach

[17] To consider this case I shall proceed first to deal with the cause of action for breach of contract. This concerns only the plaintiff and the 2nd defendant. Then I shall move on to negligence which involves all parties in this action.

Breach Of Contract

[18] According to the plaintiff, cl. 7.12 of the tenancy agreement with the 2nd defendant provides:

> QUIET ENJOYMENT OF DEMISED PREMISES
>
> The Landlord hereby covenants with the Tenant that the Tenant duly and punctually paying the monthly Rent and Service Charge hereby reserved and observing and performing the several covenant obligations provisions and stipulations contained in this Tenancy on the Tenant's part hereinbefore contained may subject to the applicable Rules and Regulations of the Building *peaceably hold and enjoy the Demised Premises for the Term hereby granted without any interruption or disturbance from the Landlord or any other person or persons lawfully claiming by or from or under or in trust for the Landlord* (emphasis added).

[19] As the result of what has happened, the plaintiff claims that the 2nd defendant has breached this condition.

[20] Attempting to escape from such obligation, the 2nd defendant sought protection under an exemption clause in the tenancy agreement. This is cl. 7.3 which reads:

> EXEMPTION OF LANDLORD FROM LIABILITY:
>
> Save and except in the case of wilful default or a breach of this Tenancy by the Landlord, the Landlord shall not be liable to the Tenant, nor shall the Tenant have any claim against the Landlord in respect of: any damage, injury or loss arising out of the leakage of the piping, wiring and sprinkler system in the Demised Premises and/or the Building and/or the structure of the Building.

[21] But as correctly pointed out by plaintiff's counsel, this exemption clause only applies if there is no wilful default or breach of the tenancy agreement by the landlord. In this case however, the landlord has breached a term of the tenancy agreement by failing to provide quiet and peaceful enjoyment to the plaintiff. This was caused by the acts of the 2nd defendant and the 3rd party which I will be elaborating shortly in this judgment.

[22] Further, if one peruse cl. 7.3 of the tenancy agreement, it only speaks of damage arising from leakage of pipe, wiring and sprinkler system. This did not happen here. There is no evidence to indicate such leakage from such conduits. The discharge of water from the sprinkler was a deliberate and intentional act to

put out the fire. When the facts do not fit the condition expressed in this exemption clause, then the 2nd defendant is not entitled to benefit from it.

[23] When the 2nd defendant has failed to discharge its contractual obligation then s. 74(3) of the Contracts Act 1950 provides:

> **Compensation for failure to discharge obligation resembling those created by contract**
>
> (3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.

[24] For this, I hold the 2nd defendant liable to the plaintiff for breach of contract.

Negligence – 1st Defendant

Principles Of Negligence

[25] On the cause of action for negligence it is best to start my analysis with the basic principle set out by Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562 @ 580:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[26] Expanding on the foreseeable test, Lord Russell in *Bourhill v. Young* [1943] AC 92 declares:

> In considering whether a person owes another a duty of care, breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man.

[27] From these doctrines one could observe that foreseeability is a pertinent factor that must be proved by the plaintiff in a negligence suit. This equally applies to damages. This means that there must be some concrete evidence of the wrongdoing link to the injury suffered by the plaintiff. To prove this, the plaintiff must

establish a *prima facie* connection between the wrongdoer and the damage caused. In this context, with regards to the 1st defendant, the plaintiff must prove that it was the 1st defendant's fault that caused or materially contributed to the damage suffered by the plaintiff. This means that one must begin by asking: whether the damage which the plaintiff suffered would have occurred 'but for' the negligence of the 1st defendant?' – see *Barnett v. Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428. Putting it in another way: could the 1st defendant, as a reasonable man, foreseen that the damage caused to the plaintiff would be of a kind that a reasonable man should have foreseen or expected – see *The Wagon Mound (No. 1)* [1961] AC 388.

[28] There is no doubt that it was the 1st defendant who started the chain of events leading to the damage caused. The 1st defendant had placed a fan to cool the server instead of paying for the building air condition supply. Since the fan was running continuously for almost six days it must have either short circuited or just burned out causing a fire. This finding is derived from evidence of the burned fan, carpet, darkened walled and ceiling in the server room and the wet floor and floods caused by water discharged from the sprinkler in the server room which was necessary to put out the fire there.

Res ipsa loquitor res ipsa loquitor

[29] But though the 1st defendant was the original wrongdoer who triggered off the incident but it was the subsequent events which eventually caused the damage to the plaintiff. Commencing from the sound of the alarm at the control panel, Suaranjan must have noticed the flow switch activated, otherwise there would be no water released from the sprinkler to put out the fire. But did Suaranjan tell Muru about this and, if he did, did Muru instruct him to switch it off? But then switching it off is not sufficient. Muru or some technicians from the 3rd party must be physically present to turn off the butterfly valve as well. Suaranjan, as a security guard, cannot perform this task. When the valve was not turned off water from the sprinkler would continue to discharge. And this was exactly what happened. Water continued to be discharged from the sprinkler for 6 hours. As stated, there is no evidence advanced by anyone to prove this fact. Of course, in normal situation, the plaintiff carries such burden of proof. However, the plaintiff has pleaded *res ipsa loquitor*. Here, when

there is *prima facie* evidence of negligence but the precise cause of which could not be shown except that it is more probable than not that it was due to an act or omission of the defendant for failing to take proper care, then it is upon the defendant to prove otherwise. Regrettably, I find that the 1st defendant has failed to rebut this presumption.

novus actus interveniens novus actus interveniens novus actus interveniens

[30] The 1st defendant has argued that even if it was the initiator of the negligence but the conduct of the 2nd defendant and/or the 3rd party constituted a *novus actus interveniens* that absolves the 1st defendant from liability. This concept of *novus actus interveniens* acts in this manner: If a particular consequence of the defendant's wrongdoing is attributable to some independent act or event which supersedes the effect of the initial tortuous conduct, then the defendant's responsibilities may not extend to the consequences of the supervening event. In short, if there is a break in the chain of causation then the original wrong doer is not liable for starting the wrong – see *Clerk & Lindsell on Torts*, 17th edn, para 2-24.

[31] But in this case, I could not detect any break in the chain of causation nor could I find that the act of the 1st defendant to be so remote that the original wrong of the 1st defendant was merely a part of history and the 2nd defendant's as well as the 3rd party's acts were wholly independent of that of the 1st defendant. I feel that the 1st defendant could have foreseen the intervening conducts of the 2nd defendant's or 3rd party. Leaving the fan on unattended for almost six days would certainly run the risk of catching fire. And when fire is ignited there would be heat. The heat would in turn bust the sprinkler bulb to activate the sprinkler. Once activated, water would be discharged from the sprinkler. Such water would be expected to flow downwards, particularly to premises directly below and such element has a tendency to destroy and damage goods kept in such places. The 1st defendant may argue that sufficient amount of water would be enough to put out a small fire in the server room rather than the excessive quantity in this case. But then, who would have known what quantity of water was required to dose off the fire at the server room when there was no one there at the material time to witness the intensity of the fire. As to the acts of Suaranjan and Muru, these too could have been foreseen in the light of the

degree of intelligence and mental attitude expected from this category of workers. They are not so remote in our current social conditions. For these reasons, I find that the defence of *novus actus interveniens* does not apply in the circumstances of this case.

Proof Of Actual Damage

[32] The next complaint of the 1st defendant is that the plaintiff has not proved actual damage. I am surprised by this allegation when the insurance adjuster (SP3) has advanced material evidence to justify the loss suffered by the plaintiff and there was no question posed by the 1st defendant to challenge this aspect of his evidence. This tantamount to an acceptance of his testimony on this matter – see *Wong Swee Chin v. PP* [1981] 1 MLJ 212 where Raja Azlan Shah CJ (Malaya) (as His Highness then was) declared:

> A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony ... On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules, there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* where Haslam J said at page 122:
>
> > In *Phipson on Evidence* (11th Ed) paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, *viz*, where '... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy ... or when counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called on the same point, it is not always necessary to cross examine them all.'

[33] And this principle was applied with equal force in civil cases of *Noor Azahar bin Habin v. Rajaswari a/p Sithampara Pillai & Anor.* [1991] 1 CLJ 150; [1991] 3 CLJ (Rep) 339.

Negligence – 2nd Defendant

[34] Since the 2nd defendant is also sued for negligence, I shall now proceed to analyze its position.

[35] Here the negligent acts or omissions of this defendant are centered on Suaranjan, an employee of the 2nd defendant. Though Suaranjan may have taken instruction from the 3rd party but I find that this type of instruction is insufficient to consider him as being under the control of the 3rd party. For this, the 2nd defendant would be vicariously liable for his actions or omissions, in this incident.

[36] Suaranjan's acts and omissions are already discussed in substantial detail above. For what he has done or omitted to do, I find him to be negligent for these reasons: First, he failed to detect the large amount of water that was virtually flowing down each floor. I believed that if he had conducted his round on each floor diligently and at regular intervals, he would have detected the presence of water which must have originated from the time when the fire alarm came on. Then he could have telephoned Muru to request Muru's presence to reverse the butterfly valve which he could perform himself. Second, as I have pointed out earlier, he must have turned off the flow switch without first ascertaining whether water was released from the sprinkler. Since I find that these wrongdoings could have been foreseen by a reasonable man to result in the kind of damage suffered by the plaintiff, the 2nd defendant, as an employer of Suaranjan, must be held vicariously liable to the plaintiff.

[37] On the claim that the plaintiff has failed to prove damages, on identical grounds stated on this same issue raised by the 1st defendant, I find no merit in this assertion.

Contribution & Indemnity By 2nd Defendant Against 3rd Party

[38] The 2nd defendant attempted to lay blame for all the misfortunes on the shoulders of the 3rd party as the building manager of the building. Under the letter of appointment as building manager, the 2nd defendant insists that it is entitled to be compensated by the 3rd party for the negligence committed by Muru, a servant and/or agent of the 3rd party.

[39] It is my view that not only Suaranjan was negligent. Muru too must bear certain degree of blame. He should have either requested for more information from Suaranjan on whether the flow switch indicator was on in the first place. If it was activated, then by instructing Suaranjan to turn it off would cause water to continue to pour out of the sprinkler unless the butterfly valve was

also reversed. And to stop this water from flowing his physical presence or that of another technician from the 3rd party was necessary. In this instance, he should have attended to this emergency personally since he was the man on standby. Without extracting more information from Suaranjan or giving him the wrong instruction as well as not being physically present at the scene, I find him negligent. He could have foreseen that his acts or omissions as described could cause the damage to the plaintiff's goods and properties. And as an employee of the 3rd party, his acts and omissions are attributed to the 3rd party vicariously.

[40] The letter of appointment of the 3rd party as the building manager has indeed allowed the 2nd defendant to seek indemnity from the 3rd party for the negligence of the 3rd party employee. For this, the 2nd defendant should be entitled to indemnify to a certain degree for the wrong committed by the 3rd party.

Findings

Against The 1st Defendant

[41] I find that the plaintiff has proved its case against the 1st defendant for negligence. The 1st defendant shall pay to the plaintiff RM259,592.26 with interest thereon at 8% per annum from date of filing to date of realization together with costs.

Against The 2nd Defendant

[42] I find that the plaintiff has proved its case against the 2nd defendant for both negligence and breach of contract. The 2nd defendant shall pay to the plaintiff RM259,592.26 with interest thereon at 8% per annum from date of filing to date of realization together with costs.

Contribution From The 2nd Defendant To The 1st Defendant

[43] Since the 1st defendant has, in its pleadings and in its submissions, mounted a claim for contribution from the 2nd defendant, the 2nd defendant shall contribute 50% of RM259,592.26 with interest thereon at 8% per annum from date of filing to date of realization to the 1st defendant. This is allowed under s. 10(2) of the Civil Law Act.

Indemnity From The 3rd Party To The 2nd Defendant

In respect of the claim for indemnity by the 2nd defendant against the 3rd party, the 3rd party shall pay to the 2nd defendant 25% of the RM259,592.26 with interest thereon at 8% per annum from date of filing to date of realization. There shall also be costs to the 2nd defendant against the 3rd party on the 3rd party notice.

Orders

[44] Accordingly, I hereby order that:

1. The 1st and 2nd defendants shall pay to the plaintiff a sum of RM259,592.26 with interest thereon at 8% per annum from date of filing to date of realization together with costs.

2. The 2nd defendant shall contribute 50% of RM259,592.26 with interest thereon at 8% per annum from date of filing to date of realization to the 1st defendant.

3. The 3rd party shall indemnify the 2nd defendant of 25% of RM259,592.26 with interest thereon at 8% per annum from date of filing to date of realization. The 3rd party shall pay costs to the 2nd defendant on the 3rd party notice.